Supreme Court, U.S.
FILED
JUN 3 1992
OFFICE OF THE CLERK

No. 91-1712

IN THE

Supreme Court of the United States

October Term 1991

CONSTRUCTIVIST FOUNDATION, INC., F/K/A LEE FOUNDATION, INC.,

Petitioner,

v.

DEKALB COUNTY BOARD OF TAX ASSESSORS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

Paula Fitzgerald Wolff
11489 Lake Potomac Drive
Potomac, Maryland 20854
(301) 299-2920

Counsel of Record
For the Constructivist Foundation, Inc.

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

IN THE

Supreme Court of the United States

October Term 1991

No. 91-1712

CONSTRUCTIVIST FOUNDATION, INC., F/K/A LEE FOUNDATION, INC.,

Petitioner,

v.

DEKALB COUNTY BOARD OF TAX ASSESSORS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

REPLY TO RESPONDENT'S OPPOSITION

The Petitioner, the Constructivist Foundation, F/K/A Lee Foundation, respectfully submits the following Reply to Respondent's Opposition to the Petition for Writ of Certiorari in the above entitled case:

I. FACTUAL ISSUES RAISED BY RESPONDENT

A. Service to Taxpayer - Respondent DeKalb County Board of Tax Assessors states that the record is absent of any facts to support Petitioner's contention that Respondent's office filed the initial lawsuit papers in Superior Court "as a service to the taxpayer". Petitioner's contention is

based on oral representations made to it by agents of Respondent. The evidence is clear that the Foundation did not file its lawsuit in the DeKalb Superior Court, but rather that the DeKalb County Attorney filed the Foundation's lawsuit.

B. Letter of 22 January 1991 - The letter advised Petitioner to consult Judge Seeliger's office regarding this case, when in fact the case had been reassigned to Judge Hunstein, which reassignment Petitioner did not learn about until after the case had been dismissed. Furthermore, Petitioner had nothing to discuss with Judge Seeliger's office until it had copies of the initial lawsuit filings, which were never sent to Petitioner although many requests were made.

C. Transfer to Judge Hunstein - Even if Petitioner did have access to and notice of the need to consult the local papers for court dates in its case, it would not have known to look for matters on Judge Hunstein's docket in the newspaper.

II. LEGAL ISSUES RAISED BY RESPONDENT

A. Applicability of *McKesson* - Petitioner has clearly shown in its Petition the relevance of this Court's 1990 decision in *McKesson* to the issues raised by the Foundation. Under the reasoning in *McKesson* post deprivation measures do not meet due process standards in the Foundation's case.

B. *Redding Ford* is not applicable to the Foundation's case - The court in *Redding Ford v. California State Board of Equalization*, 722 F. 2d 496 (C.A. Cal. 1983), cert. denied, 469 U.S. 817, 105 S.Ct. 84 (1984), stated that it was bound by its own 1982 decision in *Wood v. Sargent*, 694 F.2d 1159 (9th Cir. 1982), where the demonstrated inability to pay a tax did not, in the court's opin-

ion, prevent a plain, speedy and efficient remedy in the state courts, and therefore the jurisdictional bar of the Tax Injunction Act, 28 U.S.C. Sec. 1341 applied.

Both of these Ninth Circuit cases predate this Court's 1990 decision in *McKesson*, which resulted in a more definitive analysis of the due process standards which pertain to judicial appeals in tax collection cases. Based on that analysis, this Court needs to provide further guidance to courts hearing cases like the Foundation's -- where an impoverished, non-profit entity claiming to have exempt status is faced with an improper ad valorem tax assessment amounting to many tens of thousands of dollars and where pre-hearing deprivation does not pass due process muster, because it is not a viable option for the purported taxpayer, which never expected to be assessed such taxes and is unable to pay them.

Additionally, *Redding* is distinguishable because it involved sales and use taxes, which like the excise taxes in *McKesson*, are taxes collected by states from profit-making entities, based on their commercial activities -- taxes arguably already owned by the state, which in order to protect its interest must implement pre-hearing deprivation procedures.

C. *Hancock* is not controlling - Respondent cites *Hancock v. Board of Tax Assessors of Harris County*, 226 Ga. 570, 176 S.E. 2d 102 (1970) for the proposition that the statutory law in Georgia regarding tax appeals is not unconstitutional as violating the equal protection clause. The facts and circumstances in *Hancock* hardly resemble those involved in the case of the Constructivist Foundation. Most important, however, under the

Supremacy Clause of Art. VI of the United States Constitution, if a state law is found to conflict with a federal law or the United States Constitution, as Petitioner argues the Georgia Statute does, the federal law prevails. The highest court of the State of Georgia is not the final arbiter of the federal constitutionality of its laws.

Furthermore, while Petitioner agrees with Respondent that Georgia Statute O.C.G.A. Sec. 48-5-29 states that it is a requirement that applies to all taxpayers, Petitioner has shown in its Petition that the statute discriminates against entities which are not able to first pay before being heard in a judicial forum, in violation of the Equal Protection Clause.

D. *Texaco* does not apply - *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) has been cited by Respondent for the proposition that "All citizens are presumptively charged with knowledge of the law." *Texaco*, which also predates *McKesson*, is a mineral rights case and the relevant issue was whether the mineral owner was entitled to advance notice that his mineral interest was about to lapse under the applicable Mineral Rights Act. Knowledge of a statute is not the same as notice of a scheduled court proceeding in which the identities and addresses of parties are well known. In *Texaco* personal notification to mineral owners that their interests were about to lapse was not administratively feasible and thus not required under due process standards.

E. *E.E.O.C. v. Pan American World Airlines* is not controlling. - Respondent cites *E.E.O.C. v. Pan American World Airlines, Inc.*, 897 F. 2d 1499 (9th Cir. 1990) cert. denied, 111 S.Ct. 55 (1990) for the proposition that due process does not require the

BEST AVAILABLE COPY

government to notify individuals of bars to litigation. The fact that the court in *E.E.O.C.* determined that the notice provided by the E.E.O.C. to employees of a pending employment discrimination suit satisfied due process standards even though the notice failed to state that recipients had lost their right to bring a private action. This is hardly comparable to notice by publication to a known out-of-state litigant whose address is known, who is not likely to see the local paper, who, if it had access to the local paper would not know to look under the correct judge's name, and whose entire case is likely to be dismissed with prejudice in its absence. Notice by publication in the case of the Constructivist Foundation is, in essence, no notice at all.

The cases and reasoning in Respondent's Opposition having been clearly distinguished and invalidated, this Petition should be granted because of the far reaching and critically important issues involved.

Respectfully submitted,

Paula Fitzgerald Wolff, Esq.
11489 Lake Potomac Drive
Potomac, Maryland 20854
301-299-2920
Counsel for Petitioner
Constructivist Foundation, Inc.

7 June 1992